



February 29, 2008

Mr. Bruce Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comments on the Tentative Order for the Municipal Regional Stormwater National Pollutant Discharge Elimination System Permit

Dear Mr. Wolfe:

The San Mateo Countywide Water Pollution Prevention Program (SMCWPPP), which is a program of the City/County Association of Governments of San Mateo County, appreciates this opportunity to comment on the municipal regional stormwater NPDES permit (MRP). In some ways the draft permit shows improvement over the administrative draft permit released in 2006. In addition, we appreciate the Water Board staff's perspective expressed in its February 13, 2008 status report about Stormwater Management Programs: "Given the significant threat stormwater poses to water quality, we are working with municipalities to prioritize actions and seek additional funding." Unfortunately, a lot more still needs to be done to prioritize the activities required by the MRP. We believe that the highest MRP priorities should be placed on preparing to implement total maximum daily loads for pollutants impairing local creeks and the bay.

Most of the draft MRP is overly prescriptive about the particular manner in which compliance may be achieved. The level of detail and the inflexible requirements create a barrier for achieving permit compliance and improving water quality. One of the deficiencies of this overly prescriptive approach to regulating water quality is that it minimizes the value added of allowing municipal staff to use their experience and judgment to identify and resolve problems and make flexible adjustments in their efforts in order to assure continued progress.

We recommend that the MRP be substantially reduced and simplified to create a more accessible and understandable permit that allows municipalities the flexibility to use their unique skills and practical stormwater experience to improve water quality. As currently drafted, the MRP would bog municipal staff down in a bewildering and arbitrary reinvention of local stormwater programs. This is unnecessary given that existing, adequate stormwater programs are already in place for many of the MRP's proposed provisions. The draft permit's provisions that show the most flexibility and brevity are Provisions C.9 Pesticide Toxicity Controls, C.11 Mercury Controls, and C.12 PCB Controls. The type of flexibility exemplified in these sections should be used as models for the other permit's provisions.

SMCWPPP also agrees with and supports the comments that have been submitted by the municipalities that are members of the Program, the Bay Area Stormwater Management Agencies, the Bay Area Clean Water Agencies on pump station diversions, the Santa Clara Valley Urban Runoff Pollution Prevention Program, including Morrison and Foerster's comments on legal issues, and the comments provided by the Alameda Countywide Clean Water Program, including the comments provided by the Law Office of Gary Grimm on legal issues.

We would also like to note that your staff asked us to include in our comments proposed changes to the countywide map of hydromodification management (HM) control areas. This comment on Attachment E was prompted by a need to better clarify the HM control area boundary.

The following describes four general permit issues and suggests how these issues could be resolved. Specific important permit issues and proposed approaches to their resolution are contained in this letter's enclosure.

1. Eliminate Permit Requirements that Are Beyond the Federal Clean Water Act

What the Draft Permit Proposes

We believe that the draft permit contains numerous requirements that exceed what is required by the federal Clean Water Act. The Fact Sheet/Rationale Technical Report for Tentative Order No. R2-2008-00xx (Fact Sheet) for the permit concludes that this is not the case. Part of the Fact Sheet's support for its conclusion is that the permit "is part of a federal mandate to develop pollutant reduction requirements for MS4." Even a cursory review of the permit shows that there are many requirements that go well beyond controlling pollutants that flow to MS4s, and the following provides an incomplete list of a few examples:

- a. Requirements to control discharges and activities within the permittees' jurisdictions regardless of whether the discharge flows to the municipal separate storm sewer system.
- b. Specific requirements to divert stormwater pump station discharges to sanitary sewers.
- c. Requirements to track California Department of Pesticides Regulation pesticide evaluation activities and encourage it to coordinate with the California Water Code.
- d. Requirements to assist the Department of Pesticide Regulation and California Agricultural Commissioners to ensure that pesticide applications comply with water quality standards.
- e. Requirements to retrofit storm drain inlet markings on privately maintained streets.
- f. Monitoring requirements to assess stream channel function and condition.
- g. Permit provision to comply with SB 1070.
- h. Requirements to study the effectiveness of best management practices.
- i. Reporting requirements that are cited in the Fact Sheet as based on the California Water Code's section 13267.
- j. Advanced treatment for construction site runoff for sediment removal where municipalities have determined that there is an exceptional threat to water quality.
- k. Requirements for Enforcement Response Plans.
- l. Implementing trash and litter controls based on the San Francisco Bay Basin Water Quality Control Plan prohibition which is intended primarily to protect recreational uses, including boating and navigation.
- m. Enforcement of local ordinances to displace homeless encampments from creek sides.

Recommended Solution

As part of prioritizing efforts, it makes sense to either eliminate the numerous permit requirements that exceed the minimum requirements of the federal Clean Water Act or identify the state funding mechanism and phase in period for these requirements. Permit requirements that exceed the minimum required by the federal Clean Water Act raise important legal and cost

reimbursement issues as described in Morrison & Foerster's comments provided on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program.

2. Reduce and Simplify Proposed Monitoring Study Tasks

What the Draft Permit Proposes

The Tentative Order includes Provision 8 (Water Quality Monitoring) that contains a lengthy 18-page description of proposed monitoring requirements. In addition, the draft permit contains Attachment G that describes follow up actions that will be required based on the results of status and trends monitoring of sediment. The proposed monitoring requirements include the following sections: San Francisco Estuary Receiving Water Monitoring, Status Monitoring/Rotating Watersheds, Long-Term Trends Monitoring, Monitoring Projects, Pollutants of Concern Monitoring, Citizens Monitoring and Participation, and detailed reporting requirements.

The Fact Sheet cites EPA's 1996 Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits as stating that each stormwater permit should include a coordinated and cost-effective monitoring program. The draft MRP's proposed monitoring requirements are neither coordinated nor cost-effective. For example, the status monitoring, long-term trends monitoring, and pollutants of concern monitoring could be combined to achieve these objectives more cost-effectively than the way the permit proposes that they be conducted as separate endeavors.

In addition, the amount of monitoring needs to be reduced substantially to be cost-effective. Any funds spent on monitoring need to be commensurate with the benefits achieved by the monitoring. One way that this may be accomplished would be to reduce the frequency of monitoring to match what is needed to track long-term trends in pollutant concentrations. For example, the long-term trends monitoring proposed to occur every other year (Table 8-3) could be scaled back to every ten years for pollutants that are expected to change slowly over many decades.

Recommended Solution

It is proposed that Provision 8 (Water Quality Monitoring) be totally rewritten to reduce the amount of monitoring to what would be reasonable for municipalities to implement. Some of the proposed monitoring tasks should be deleted and others need to be reduced and simplified. The amount of monitoring that the Program is currently implementing should be reprioritized to accomplish some of the most important monitoring objectives listed in the draft permit. It should also be recognized that a number of the proposed monitoring tasks are better suited to nationwide and statewide monitoring efforts under the direction of U.S. EPA and the State Water Resources Control Board than to implementation by local agencies.

This permit section should be revised to require municipalities to develop a monitoring plan that addresses and describes the type, interval, and frequency of monitoring that would be conducted to yield data which are representative of the monitored activity. This monitoring plan could be available for public review, comment, and modification before you consider accepting the proposed plan.

3. Need to Phase in Enhanced Pollution Controls That Would Increase Municipal Costs

What the Draft Permit Proposes

The Water Board staff should act on its recognition (expressed in its February 13, 2008 status report referenced above) that municipalities need time to fund worthwhile, new requirements. This is particularly important given the current difficult economic period and the effects that the state budget crisis will have on the availability of funding for municipalities. In addition, there is a lack of available funds that could be diverted from existing stormwater tasks to new stormwater tasks or from other existing municipal budget priorities to stormwater. The Water Board should allow an adequate phase in period to attempt to secure additional sources of revenue.

The potential funding sources that do not require voter approval are limited and unlikely to provide a substantial fraction of the funds needed to implement the MRP. It is likely that the proposed MRP provisions requiring significant additional expenditure would need voter approval, such as taxes to finance new bonds to pay for capital projects and/or property associated stormwater fees to pay for long-term maintenance. For example, the permit's Fact Sheet reports that the Los Angeles and City of Oakland trash capture device installations were funded in large part through voter-approved taxes to finance bonds.

Municipalities need time to develop financial plans, and without taking an advocacy position, time to educate property owners and/or voters on the benefits of providing additional stormwater fees and/or bonds. Time is also required to hold an election, and if successful, start to collect funds until a sufficient amount is available to undertake the projects needed to comply with the permit.

Recommended Solution

The permit's compliance dates should be adjusted to provide a five year period or longer to attempt to secure and accrue the necessary revenue to meet significant new permit requirements that do not exceed the minimum federal Clean Water Act requirements. The draft permit should also allow that if the voters are not supportive of additional stormwater fees and/or taxes to finance bonds at the time of the vote, the permit's schedule for implementing the unfunded requirements would be extended.

Some of the newly proposed high-priority MRP provisions that will be expensive to implement include Provisions C.10 Trash Reductions, C.12 PCB Controls, and C. 11 Mercury Controls. SMCWPPP estimates that in most years the additional work required to implement the draft MRP's PCBs and mercury requirements will contribute between 40 and 50 percent of the increase in SMCWPPP's General Program costs. The municipalities did not cause nor do they control the sources of mercury and PCBs releases, and their municipal separate storm sewer systems merely act as a conveyance for these pollutants to reach local creeks, the bay, and ocean. On this basis, and considering the unfunded mandates issue, it makes sense that grant funds, such as Proposition 84, be made available to determine how to control high priority pollutant sources. If the Water Board is able to make sufficient grant funds available in a timely manner to implement these provisions' pilot projects, these pilot projects could proceed according to the draft permit's proposed schedule. The enclosure to this letter also contains a number of

suggestions about how to focus the proposed mercury and PCBs pilot projects in order to make them more cost effective.

4. Allow a More Flexible Approach to Trash and Litter Reduction

What the Draft Permit Proposes

The draft MRP's Provision C.10 proposes that each Permittee identify high trash and litter catchments totaling at least 10 percent of the urbanized area within its jurisdiction and implement actions to reduce the impact of trash on beneficial uses. The draft MRP requires two types of control actions: one, the installation of "full trash capture devices" on at least 5 percent of the catchment area and, two, the use of "enhanced trash management control measures." The permit also requires that the "enhanced trash management control measures" be implemented as interim controls in the areas where "full capture devices" would eventually be installed.

The draft MRP contains a detailed list of what would qualify as "enhanced trash management control measures." One of these proposed tasks would require "increased public outreach on litter and trash control, particularly noting the impacts on creeks and the Bay in the outreach message" (Provision 10.b.i.(1)). It would be difficult and inefficient to target public outreach messages to only a small portion of a municipality. In addition, it is unclear what is the technical basis for the very prescriptive requirements listed in this section of the proposed permit. For example, what studies have been done that demonstrate the needed threshold of implementation should be for streets to be swept weekly and storm drain inlets cleaned at a minimum of four times per year? The Fact Sheet does not describe how these detailed requirements were derived.

The proposed approach to solving trash and litter problems is overly prescriptive, and does not recognize the variety of possible trash and litter problems and the need to implement cost-effective solutions that are tailored to solve particular problems. For example, in some areas, the Program has identified residents and their gardeners dumping grass clipping and yard prunings onto backyard creek banks as a source of trash and litter. In other cases, the source of the problem appears to be from a particular school, shopping center, apartment complex, or freeway.

The Fact Sheet reports that a Water Board study found, "There are trash source hotspots, usually associated with parks, schools, or poorly kept commercial facilities, near creek channels, that appear to contribute significant portion of the trash deposition at lower watershed sites." Every trash and litter problem would be more cost-effectively handled by allowing the local municipality to identify the optimum solution rather than to require an arbitrary amount of municipal land area to have "full trash capture devices" and that another arbitrary amount of land be subject to very prescriptive "enhanced trash management control measures." The proposed MRP's inflexible approach will hinder the implementation of cost-effective ways of making measurable improvements in high priority trash and litter catchments.

On March 14, 2007 the Water Board heard a status report on the MRP that elicited many comments on the need to improve trash and litter control. Some of the commenters pointed out the variety of societal problems, such as homeless encampments, that in some locations contribute significantly to garbage and hazardous material being dumped along creeks. The Board members suggested that it would be worthwhile to form a multi-agency team to help improve the control of trash and litter. Subsequently, some legislators have also identified a need

for a “more comprehensive public policy and regulation to protect the Bay from trash and marine debris.”¹ Has a multi-agency team been created to develop a more comprehensive public policy to deal with trash and litter? If so, what solutions is it recommending and how are these solutions related to what is being proposed in the draft permit?

Recommended Solution

The permit should be modified to allow flexibility in addressing trash and litter control problems so that cost-effective solutions may be implemented that are tailored to solving particular problems. It is recommended that the permit be rewritten to require that each municipality select one high trash impact catchment that is tributary to its municipal separate storm sewer system, implement an appropriate solution or require the responsible parties to implement a solution, and then demonstrate measurable reductions in trash and litter. On this basis it is recommended that the permit be revised to eliminate the proposed permit’s requirements for at least 10 percent of the high trash and litter urban land area within a municipality’s jurisdiction to have trash controls along with the proposed requirement that half or more of this 10 percent catchment area be controlled with full trash capture devices.

In addition, since a high priority of the City/County Association of Governments of San Mateo County is to implement sustainable green streets and parking lot projects using the vehicle registration fees collected under AB 1546 (Simitian – 2004), the permit should also state that any municipality that is implementing this type of project would be meeting the permit’s trash and litter requirements during this permit period through the design, construction, and maintenance of its sustainable green street or parking lot project. We believe these multi-objective projects will have a beneficial impact on trash and litter. In addition, trash and litter controls that can be accomplished as part of multi-objective projects are more sustainable and financially viable than single-purpose approaches.

We look forward to continuing to work with you and your staff to resolve the issues described in this letter and enclosure. It is important to develop phased, permit requirements that are flexible, practical, and cost-effective, while meeting the challenges of continuing to clean up local waterways. We are available to meet with you and other stakeholders to identify permit priorities and cost-effective implementation strategies. We are also interested in learning more about your efforts to seek additional sources of funding for stormwater programs. Please call me if you have any questions or comments.

Sincerely,



Richard Napier, Executive Director
City/County Association of Governments of San Mateo County

Enc: Specific Issues Raised by Draft Municipal Regional Stormwater NPDES Permit Dated December 14, 2007
and Possible Solutions

¹ Letter dated October 29, 2007 from 13 local legislators to Regional Board Chair John Muller.